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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/698,799 | 10/31/2003 | Pradip Roy | 67500-658 | 2462 |

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| EXAMINER |
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PEARSE, ADEPEJU OMOLOLA

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| ART UNIT | PAPER NUMBER |
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1761

DATE MAILED: 11/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

48

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|------------------------------|--------------------------------------|-----------------------------------|--|
| Office Action Summary | Application No. 10/698,799 | Applicant(s) ROY ET AL. | |
| | Examiner Adepeju Pearse | Art Unit 1761 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-45 is/are pending in the application.
4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-45 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date ____ | 6) <input type="checkbox"/> Other: ____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1-27, are rejected under 35 U.S.C. 103(a) as being unpatentable over Kepplinger et al (US Pub. 2002/0192345) in view of Hunter (US. Pat. No. 3,365,305). With regard to claims 1-6 and 14-20, Kepplinger et al disclose an aerated food component having a high fruit content

Art Unit: 1761

([0011] lines 1-2), the amount of fruit concentrate utilized varies from 1 to 80%, but the preferred range is from 5 to 20% as in claims 3, 15 and 16 ([0014] lines 9-13), these ranges are within applicant's recited range. However, Kepplinger et al failed to disclose a solids level greater than 80% as in claim 17. It would not have involved an inventive step to increase the level of solids from 80% to 81% or higher because the level is already high enough to be able to incorporate other ingredients absent any clear and convincing evidence and/or arguments to the contrary. The fruit concentrate can comprise a puree of a desired fruit, fruit juice, fruit powders and combinations thereof as in claims 4 ([0014] lines 1-5). The aerated food component has a moisture content of from 14 to 30%, but can be dried to a moisture content from 1 to 6% as in claims 6, 19 and 20 ([0012]). However, Kepplinger et al failed to disclose hexametaphosphate as a component. Hunter teaches an aerated food product comprising from 0 to 12% on dry basis of a buffering agent such as sodium hexametaphosphate as in claim 5 (col 3 lines 67-75). It would have been obvious to one of ordinary skill in the art to modify Kepplinger et al with Hunter by incorporating hexametaphosphate as a buffering agent.

5. With regard to claims 7 and 27, Kepplinger et al disclose a flavor content of 1.16% and a color content of 0.27%. These percentages are within applicant's recited range. (See page 4, table 2).

6. With regard to claims 8, 13, 21 and 26 Kepplinger et al disclose a variety of sweeteners that can be utilized at a range from 10 to 90% including corn syrup, sucrose ([0013]); this range is within applicant's recited range. Claims 8 and 21 further require the use of a seed sugar. Table 1 shows granulated sugar, applicant's specification disclose particular fine sugars ([0013]). No patentable distinction is seen at this time in the use of the granulated sugar and the use of a seed

Art Unit: 1761

or “fine” sugar absent a showing of unexpected result using the claimed seed sugar. Therefore, it would have been obvious to one of ordinary skill in the art to use the granulated sugar of the reference as a sweetener absent a showing of unexpected results using a seed sugar.

7. With regard to claims 9-12 and 22-25, Kepplinger et al disclose that ionic hydrocolloid compounds such as alginate, carrageenan or low methoxy pectin could be utilized in an aerated product to help form stable aerated structures at a range from 0.1 to 5%, this range is within applicant’s recited range ([0015] and [0016]). Kepplinger et al also disclose that other ingredients such as guar gum, xanthan gum etc could be utilized ([0022]). It would be obvious to expect that these compounds will also function as film-forming agents because they have the same components.

8. Claims 28-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kepplinger et al (US Pub. 2002/0192345) in view of Hunter (US. Pat. No. 3,365,305) as to the above claims and further in view of Zietlow et al (US. Pat. No. 6,432,460). With regard to claims 28-30, 33, 40 and 42, Kepplinger et al disclose that the aerated food product can be used in a variety of ways, it can be a stand-alone marshmallow-type snack or it can be incorporated as part of other food products ([0024] lines 1-4). A sample was prepared by combining water, high fructose corn syrup, sugar, and gum as in claim 30. The mixture was heated to 88% solids as in claims 29 and 33, and then cooled to 100°F, which is below the crystallization temperature of the sucrose solution ([0025]). The cooled mixture was then combined with the other ingredients in amounts as recited above such as fruit puree, flavor, color etc. The mixture was aerated by mixing using a paddle on high speed for 5 minutes ([0025]). A particular amount of a hexametaphosphate has

Art Unit: 1761

been disclosed above. However, Kepplinger et al failed to disclose the density of the aerated product and adding a particular amount of a hexametaphosphate. Zietlow et al teach an aerated food product, especially marshmallow with about 1 to 30% moisture and having a density of about 0.1 to 1.0g/cc (abstract). By conversion this is 0.8 to 8pds/gallon. This range is within applicant's recited range as in claims 28 and 42. Hunter teaches adding from 0 to 12% of sodium hexametaphosphate as a buffering agent (col 3 lines 67-75). It would have been obvious to one of ordinary skill in the art to modify Kepplinger et al with the teaching of Hunter and Zietlow et al to expect that as the referenced composition possesses the elements as instantly claimed, it would be considered inherent that the density is similar absent any clear and convincing evidence and/or arguments to the contrary.

9. With regard to claims 31-32, Kepplinger et al disclose a sugar solution heated to 246°F and then cooled to 180°F ([0030]). These temperatures are within applicant's recited range

10. With regard to claims 34 and 35, Kepplinger et al disclose an aerated food component having a high fruit content ([0011] lines 1-2), the amount of fruit concentrate utilized varies from 1 to 80%, but the preferred range is from 5 to 20%. These ranges are within applicant's recited range.

11. With regard to claim 36, Kepplinger et al disclose a variety of sweeteners that can be utilized at a range from 10 to 90% including corn syrup, sucrose ([0013]), and table 1 shows granulated sugar. However, Kepplinger et al failed to disclose adding seed sugar to the cooled sucrose solution. Zietlow et al teach a method of preparing an aerated confection by seeding a liquid confection blend with dry sugar crystals to form a seeded liquid confection and then aerating and drying to form a dried aerated confection piece (abstract). Applicant's specification

Art Unit: 1761

discloses particular fine sugars ([0013]). No patentable distinction is seen at this time in the use of the granulated sugar and the use of a seed or "fine" sugar absent a showing of unexpected result using the claimed seed sugar. Therefore, it would have been obvious to one of ordinary skill in the art to use the granulated sugar of the reference as a sweetener absent a showing of unexpected results using a seed sugar.

12. With regard to claims 37-39, Kepplinger et al disclose that ionic hydrocolloid compounds such as alginate, carrageenan or low methoxy pectin could be utilized in an aerated product to help form stable aerated structures at a range from 0.1 to 5%, this range is within applicant's recited range ([0015] and [0016]). Kepplinger et al also disclose that other ingredients such as guar gum; xanthan gum etc could be utilized ([0022]).

13. With regard to claims 43-45, Kepplinger et al disclose that the aerated food product can be extruded into a desired shape ([0024]) and that the product has a moisture content of from 14 to 30%, but can be dried to a moisture content from 1 to 6% ([0012]). This range is within applicant's recited range.

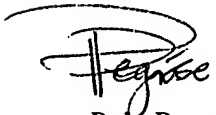
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Peju Pearse
Art unit 1761
11/04/2005


HELEN PRATT
PRIMARY EXAMINER